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No. 89-7272

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD HARMELIN,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

IS A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR A FIRST OFFENDER CONVICTED OF POSSESSING OVER 650 GRAMS OF A MIXTURE CONTAINING COCAINE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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INTEREST OF AMICI CURIAE[1]

Criminal Defense Attorneys of Michigan (CDAM) is a statewide, nonprofit organization with several hundred members including all public defenders in the State of Michigan as well as contract defenders and private attorneys. Since its inception in 1976, CDAM has been active in providing continuing legal education for criminal defense lawyers, and in serving as amicus curiae in cases of significance to the criminal jurisprudence of the State of Michigan.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit association of over 6,600 criminal defense attorneys from all 50 states, the District of Columbia, Puerto

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[1]Letters of consent to the filing of this brief have been lodged with the clerk pursuant to Rule 37.3.

Rico and the Virgin Islands. NACDL is dedicated to the equal and just enforcement and application of the criminal laws of the United States and of the Constitution of the United States of America. In the past, NACDL has participated as amicus in a number of cases before the Court involving the interpretation of the Constitution.

Amici Curiae file this brief, to urge this Court to find that the statute mandating the sentence imposed in the instant case fundamentally violates the constitutional protection against cruel and unusual punishment expressed in the Eighth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Ronald Harmelin, a forty-two year old man with no prior criminal convictions, was pulled over by the police for failure to stop at a red light. A subsequent search of his 1977 Ford automobile revealed 672 grams of a mixture containing cocaine and a gun for which Petitioner had a permit. Petitioner was charged with possession of over 650 grams of cocaine in violation of MCL 333.7403(2)(i) and with possession of a gun during the commission of a felony. He was convicted of these charges after a bench trial before the Honorable Gene Schnelz, Judge of Oakland County Circuit Court.

On April 30, 1987, Petitioner was sen

tenced to the only punishment possible under this statute, life in prison without parole.

Petitioner's conviction and sentence were affirmed by the Michigan Court of Appeals on April 18, 1989. People v Harmelin, 176 Mich App 524 (1989). On January 29, 1990 the Michigan Supreme Court denied leave to appeal. People v Harmelin, 434 Mich 863 (1990). Mr. Harmelin filed a petition for a Writ of Certiorari on April 2, 1990. Certiorari was granted on May 29, 1990. This is the brief amicus curiae on behalf of the Criminal Defense Attorneys of Michigan (CDAM) and the National Association of Criminal Defense Lawyers (NACDL).

SUMMARY OF ARGUMENT

This case involves the constitutionality of the mandatory nonparolable life sentence authorized by MCL 333.7401(1)

and (3). Unlike in Rummel v Estelle, 445 US 263 (1980), where this Court found a statute which authorized a punishment of life in prison with the possibility of parole to be constitutional, and comparable to mandatory death penalty statutes struck down by this Court for their failure to permit consideration of mitigating circumstances, the punishment in this case is unconstitutionally cruel and unusual for the reason that it mandates life in prison without parole to everyone convicted of posessing any mixture of 650 grams or more containing cocaine. This result follows regardless of the circumstances of the offense including the quality of the mixture and defendant's knowledge of the quantity of the mixture, and regardless of the individual characteristics of the defendant. Nor is the constitutionality of this statute saved by the

possibility of executive clemency. As this Court held in Solem v Helm, 463 US 277, 303 (1983), reliance on "such a bare possibility would make judicial review under the Eighth Amendment meaningless."

Moreover, the punishment mandated by the Michigan statute is disproportionate to the offense and disproportionate to the punishment authorized by all other comparable state and federal statutes.

ARGUMENT

A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR A FIRST OFFENDER CONVICTED OF POSSESSING OVER 650 GRAMS OF COCAINE IS CRUEL AND UNUSUAL PUNISHMENT.

The mandatory nonparolable life sentence imposed on Mr. Harmelin violates the Eighth Amendment in two respects. The sentence is disproportionate as applied to his individual circumstances

and the statute fails to provide for individualized sentencing.

A. THE SENTENCE IS DISPROPORTIONATE AS APPLIED TO PETITIONER.

The Eighth Amendment proscription against cruel and unusual punishment prohibits not only barbaric and unacceptable modes of punishment, but limits the imposition of excessive sentences for a particular offense. Solem v Helm, 463 US 277 (1983). Because of the extreme and unique nature of the death penalty, this Court has subjected capital sentences to rigorous inquiry. Coker v Georgia, 433 US 584 (1977); Enmund v Georgia, 458 U.S. 782 (1982). The review of prison sentences often involves difficult line drawing and the comparison of terms which because of complex parole and sentence reduction provisions do not lend themselves to a

quantitative analysis. Rummel v Estelle, 445 US 263 (1980). The body of the Eighth Amendment decisions confirms that legislative judgments regarding, the appropriate length of prison sentences must be accorded substantial deference. Hutto v Davis, 454 US 370 (1982).

The analytical difficulties which impede the routine application of the proscription on cruel and unusual punishment to ordinary prison sentences do not exist in the instant case. Among prison sentences, the Michigan statute stands alone as a paragon of harsh and inflexible punishment. The statute does not distinguish between varying levels of individual culpability or prior criminal record. Thus, a large-scale dealer with an extensive record is treated the same as a minor participant who is a

first time offender. See People v Harman, 124 Mich App 93, 103, 333 NW2d 591 (1983) (M.J. Kelly, J., dissenting).

The statute requires only a mixture containing a controlled substance; it draws no distinction based on the pruity of the controlled substance. Thus a person convicted of possession of one gram of cocaine mixed in the 649 grams of sugar would be subjected to mandatory life without parole. See People v Lemble, 103 Mich App 220, 223, 303 NW2d 191 (1981). In addition, a defendant, whether he is a principal or an aider and abetter, need not be aware that an amount of at least 650 grams is involved. See People v Cortez, 131 Mich App 316, 331, 346 NW2d 540 (1984).

Upon conviction, the sentencing court and the parole authorities are

powerless to interfere with the legislative mandate of natural life in prison. The Michigan legislature has possessing 650 grams of preemptively determined that every individual convicted of cocaine must, irrespective of mitigating circumstances, be permantly disposed to prison. Deference to legislative authority does not insulate unreasonable sentences from constitutional review. As demonstrated by this Court's decisions, the level of scrutiny must intensify as the penalty increases and as the discretionary range of sentencs narrows. Solem, supra; Furman v Georgia, 408 US 238 (1972).

The Solem court recognized that the principle that punishment should be proportionate to the crime has deep historical roots:

> A principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive...These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments... . When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional.463 US at 285

Justice Powell, writing for the majority, began his opinion by emphasizing:

> Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in Robinson v California, 370 US at 667, 8 LEd2d 758, 82 SCt 1417, a single day in prison may be unconstitutional... 463 US at 290 (emphasis added).

The question to be addressed in an Eighth Amendment analysis is whether the sentence is proportionate to the crime for which the defendant has been convicted.

The Solem court explained that the proportionality analysis should focus on objective criteria, including the following:

1. The gravity of the offense and the harshness of the penalty.

2. Sentences imposed on other criminals in the same jurisdiction.

3. Sentences imposed for commission of the same crime in other jurisdictions. 463 US at 292

The question specifically before this Court, then, is whether a non-parolable, mandatory life sentence for possession of more than 650 grams of a mixture containing cocaine when applied to a first offender is proportionate to the crime.

This Court first addressed a mandatory life sentence in an Eighth Amendment context in Rummel v Estelle, 445 US 263 (1980). The defendant was a third felony offender who, under the Texas habitual offender statute, had been sentenced to life in prison. This Court accorded great deference to the Texas legislature's determination that repeat offenders, even those convicted of petty crimes, should be treated more harshly than a first offender. In upholding the sentence, this Court stressed that while Petitioner had no enforceable right to parole under the sentence, parole was an established variation on imprisonment. Therefore a proper evaluation of whether the sentence constituted cruel and unusual punishment could not be recognition that the petitioner would not

actually be imprisoned for the rest of his life. This Court then held that a sentence of life with the possibility of parole for an habitual offender was not so grossly disproportionate to the crime and therefore was not cruel and unusual punishment. Significant to the decision was the recidivist statute's goal of identifying individuals whose criminal history demonstrates that he refuses to conform to societal standards.

In Solem, supra, this Court addressed for the first time a penalty, similar to the instant one, of life without parole. In Solem the defendant was convicted of a seventh non-violent felony under South Dakota's habitual offender law, and sentenced to life without parole. The majority acknowledged that three years earlier in Rummel v

Estelle, supra, this Court had indicated that an argument could be made that the length of a sentence is a matter purely of legislative prerogative unconstrained by the Constitution. This Court then proceeded to reject South Dakota's assertion that its statutory scheme was beyond Eighth Amendment scrutiny. The Court recognized that it would be wholly illogical to subject the punishments of fines and death to a proportionality analysis but not the punishment of imprisonment.

> There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment...It would be anomalous indeed if the lesser punishment for a fine and the greater punishment of a death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is

also no historical support for such an exception. 463 U.S. at 288-289 (footnote omitted).

The Solem court concluded that a sentence of life without parole for a seventh non-violent felony constituted cruel and unusual punishment under the Eighth Amendment.

Application of the objective criteria employed by the Solem court to the sentence at issue, exposes the punishment as cruel and unusual. The only other Michigan offense mandating a minimum sentence of life imprisonment without parole is first-degree murder. MCL 750.316; MCL 791.234(4). This heinous crime is easily distinguishable from Defendant's offense because it involves the loss of life. Other distinctions include the violent nature of the crime, the immediacy of the harm, and the absence of participation by the victims.

Comparisons between crimes are difficult, but there are many nonconsensual, violent crimes that draw lesser sentences. Among the many offenses are second-degree murder, MCL 750.317 (life or any term of years); Kidnapping, MCLA 750.349 (life or any term of years); riminal sexual conduct in the first-degree, MCLA 750.520(b) (life or any term of years). In each of these offenses, the legislature has allowed the courts to exercise discretion in sentencing. None of them carries a mandatory sentence nor do they preclude parole.

The classification of possession of more than 650 grams of a substance containing cocaine as equivalent to first-degree murder but more serious than second-degree murder for the purposes of sentencing defies logic and rationality.

Amici fully recognize the extent of the drug abuse problem in modern society. Nevertheless, the severity of a drug possession offense cannot in fairness be considered, in all cases, to exceed intentional homicides. The irony of this statute is that, had Petitioner panicked at the traffic stop, unpremeditatedly shot and killed the two police officers, dumped the cocaine, and then been arrested, he would have been subject to a sentence of any term of years up to life and on a life sentence would be eligible for parole in ten years. MCL 791.234(4) In addition, on a sentence calling for a term of years Petitioner would be

eligible for disciplinary credits, MCL 800.33(5) (1979).[2]

The necessary fact of a death of a human being, absent any mitigating or justifying circumstances, must make first-degree murder the most serious known to the law. This principle was expressed by the United States Supreme Court in Coker v Georgia, supra, 433 U.S. at 597-598, which held that the Eighth Amendment bars a state legislature from imposing the death penalty for a rape conviction. While the Coker decision concerned the death penalty the

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2. The Michigan Supreme Court recently held that where a defendant is sentenced to a term of years, the minimum cannot exceed his life expectancy. People v Moore 432 Mich 311 (1989)

Court's rationale is applicable to the instant case.

> "Rape is without doubt deserving of serious punishment; but in terms of moral deparvity and the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." 433 US at 598

In the context of the present case, the offense of possession of more than 650 grams of a substance contaning cocaine can be substituted for rape in the reasoning of the Coker court. In terms of "moral depravity" and "injury to the person and to the public," it does not compare to first-degree murder. It cannot be denied that the potential of a death exists from the possession, use, or delivery of a controlled substance, either from ingestion of the drug or from violence related to the business of

drug dealing. In this sense an argument could be made that possession of a large quantity of a Schedule 1 substance, or cocaine, is the equivalent to disregard of the risk of death with knowledge that death or great bodily harm could result from that act. This argument, however, only supports an equivalency comparison between the drug offense and second-degree murder under Michigan law.

All other life sentence offenses in Michigan permit the exercise of some judicial discretion. A sentence is more likely to be proportionate to the crime if the trial judge is allowed to take into account mitigating circumstances in the offense, the defendant's individual characteristics, and the defendant's prior record.

A significant consideration in comparing the harshness of the penalty to the severity of the offense is the fact that the sentence at issue is not subject to parole. The only potential avenue for release under the present sentence is commutation by the governor. MCL 791.244.

The distinction between the availability of parole and the potential of commutation is crucial to a review of the effect of a particular sentence for purposes of a Eighth Amendment analysis. In Solem, this Court emphasized the difference between parole eligibility and the possibility of executive commutation:

> Helm's present sentence is life imprisonment without possibility of parole. Barring executive

> clemency, see infra, at 300-303, 77 LEd2d, at 655-657, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily. (Empahsis added)
>
> ***
>
> The possibility of commutation is nothing more than hope for 'an ad hoc exercise of clemency.' It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eight Amendment meaningless. 463 U.S. at 297, 303 (footnote omitted) (emphasis added).

Indeed, Michigan's present governor, James Blanchard, has pardoned only one

inmate in seven years.[3]

Thus under discretionary life sentences in Michigan, which are subject to MCL 791.234(4), the "lifer law," which provides for the possibility of parole after 10 years, it is possible to generally predict, given the statutory procedures, when a parole might be granted. As to commutation, it is impossible to predict if or when it will occur. The non-parolable aspect of the instant statute further evidences both its

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3. The drug statute under analysis was enacted in 1978. No one serving time under it has been pardoned. The statistics on pardons are provided by William J. Hudson, Chairperson of the Parole Board, Michigan Department of Corrections, October 16, 1989.

excessiveness in relation to the offense and its disparity from the sentences permitted for other serious offenses within Michigan.

A third criterion under the proportionality test set forth in Solem v Helm, supra, is a comparison of the sentence imposed for commission of the same crime in other jurisdictions. In Helm, this Court noted that only one other state, Nevada, allows the imposition of a sentence of life without parole for repeat offenders.

Out of 50 states and the District of Columbia, only Michigan authorizes a mandatory sentence of life imprisonment without parole for possession of cocaine, regardless of any other characteristics of the offense or of the individual defendant. Only 10 states --

Connecticut, Idaho, Kansas, Montana, Norta Dakota, Neveda, Oklahoma, Rhode Island, Tennessee, and Texas -- provide for a possible life sentence for first offenders. But these states do not preclude the possibility of parole, nor considerable exercise of discretion by the sentencing judge. Missouri does punish trafficking, an offense more reprehensible than the one at bar, by a non-parolable life sentence. But the sentence is not mandatory. The judge has the discretion to impose a 10 - 30 year sentence. See Appendix for a list of penalties for the comparable offense in other states .

Under federal law, 21 U.S.C. §841(b)(1)(B)(ii) which prohibits possession with intent to deliver 500 grams or more of a mixture containing cocaine,

Petitioner would have received a significantly lighter sentence, even under the "toughened" sentencing guidelines.[4] Under the United States Sentencing Commission Guidelines, Petitioner's offense level would be 26, which provides for a 63 to 78 month sentence. If, however, the sentencing court were to consider Petitioner an organizer, leader, manager, or supervisor of a drug operation,- the sentence could have been enhanced two levels, which provides for a sentence of 78 to 97 months. It should also be noted that a firearm was found in

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4. 21 USC 841(b)(1)(B)(ii) mandates a minimum sentence of 5 years and a maximum sentencing of 40 years with a provision for supervised release of at least 4 years after discharge from prison.

Petitioner's car at the time the cocaine was also discovered for which Petitioner had a permit. If one wished, however, to enhance his sentence by arguing that firearm was used in the commission of the offense and couple this enhancement with the enhancement provision for an organizer, leader, manager, or supervisor, the maximum sentence under the guidelines would still only be 97 to 121 months. See United States Sentencing Commission Guidelines, §2D1.1 (November 1, 1987) (November 1, 1989 Amendments to Guidelines).

Under federal law the only possibility of a mandatory minimum of life without parole for a first offender for possession of 500 grams or more of a mixture containing cocaine is under Title 21 USC §848, the continuing

criminal enterprise statute (often referred to as the drug kingpin statute). In order to convict an individual under this statute, a person has to be an organizer, supervisor, or manager of five or more persons, and commit a continuing series of violations; he or she must derive substantial resources from the activities; and it must be shown that the organization grossed at least ten million dollars in any twelve month period, or alternatively, that the organization distributed 150,000 grams of cocaine (over 22 times the amount of cocaine Petitioner had in his possession). The trial court has the authority, however, to reduce the sentence below the statutory mandatory minimum of life without parole under Rule 35 of the Federal Rules of Criminal Procedures, which

allows a reduction below the mandatory minimum based upon substantial cooperation. Under the Michigan statute in question, there is no vehicle for the trial court to depart from the mandatory minimum no matter what the circumstances. The legislative scheme provides for a departure from the mandatory minimum only for quantities less than 650 grams if the trial court finds substantial and compelling reasons. MCL §333.7401 et seq. (West Supp 1990).[5]

Absent a conviction under the

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5. Under the Michigan statutory scheme dealing with the possession, delivery, or manufacture of cocaine the penalties are graduated depending on the amounts. Possession of less than 25 grams carries a sentence of 0-4 years and/or a $25,000 fine. Possession of 25-50 grams carries a penalty of a minimum sentence of 1 year and a maximum sentence of 4 years, or lifetime probation, and/or a $25,000 fine. Delivery of under 50 grams carries a minimum penalty of one year and a

continuing criminal enterprise statute, the only time a first offender can receive life without parole is if aggravating factors resulting in death or

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(continuing)
maximum penalty of 20 years or lifetime probation and up to a $25,000 fine. Delivery or possession of 50 grams but less than 225 grams carries a minimum of 10 years and a maximum of 20 years. Delivery or possession of 225 grams but less than 650 grams carries a minimum sentence of 20 years and a maximum sentence of 30 years. Delivery or possession of 650 grams or more carries a sentence of mandatory life without parole. The trial court may depart from the mandatory minimum provided for the lesser quantities if the trial court finds substantial and compelling reasons. See People v Downey, 183 Mich App 405 (1990).

serious bodily injury are present.[6] Even where death or serious bodily

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6. Under 21 USC 841(b)(1)(B)(ii) a defendant is subject to a mandatory life sentence if he or she has one or more prior convictions and death or severe bodily injury results. In the absence of death or severe bodily injury a second offender is subject to a minimum sentence of 10 years and a maximum sentence of life.

Under 21 USC 841(b)(1)(A)(ii) which prohibits the possession with intent to distribute five or more kilos of a mixture containing cocaine (50,000 grams) a defendant is subject to a mandatory minimum of not less than 10 years or more than life. If death or serios bodily injury occurs the sentence is not less than 20 or more than life. If the defendant has one prior conviction the sentence is not less than 20 nor more than life. If, however, death or serious bodily injury results the defendant faces a mandatory sentence of life. A defendant with two or more prior convictions is also subject to a mandatory minimum of life without parole.

injury is present, however, a sentence is not mandatory; rather, the statute calls for a mandatory minimum of 20 years with a maximum of up to life.

In 1988, the Fifth Circuit found a life without parole sentence constitutional for a Louisiana heroin dealer with two previous felony convictions. Terrebonne v Butler, 848 F2d 500 (5th Cir. 1988). Louisiana's statute however, did not in fact require life without parole. As the Fifth Circuit noted:

> At the time Terrebonne was first sentenced, although the judge had no discretion but to impose such a sentence, he could have either ordered the life sentence enforced or he could have suspended the execution of it, with or without a term of probation. LaRS 40:966(B)(1), as amended by Acts 1973, No. 207 §3; State v Hoplins, 367 So.2d 346 (La. 1979).
>
> In addition, as recognized by the Louisiana Supreme Court in State v Hopkins, supra, under La. Code Crim.

Proc. art. 893, as it read in 1975, the court could have suspended the sentence of even a multiple offender convicted of heroin distribution, if the defendant "intends to participate in the program authorized by the Federal Narcotics Rehabilitation Act or other federal or state rehabilitation programs." 848 F2d at 504 n. 8.

The Sixth Circuit relied on the Terrebonne decision in to reject a constitutional challenge to the instant statute in Young v Miller, 883 F2d 1276 (6th Cir. 1989). The Court's reliance, however, was misplaced and its decision is inconsistent with Solem. The Young court refers to the Louisiana statute as providing for a mandatory non-parolable life sentence. 883 F.2d at 1285. As the above footnote from Terrebonne shows, however,the statute allows for the imposition sentences other than life without parole. Additionally, the defendant in Terrebonne, unlike the

Petitioner, was not a first offender, but had two prior felonies.

In upholding the statutes, however, both the Fifth and Sixth Circuits recognized the severity of the sentences

> In this case, we...believe that the tiger trap may have sprung upon a sick kitten. We are not at all convinced that petitioner Young is the type of "King pin" drug dealer which the Michigan legislature has properly targeted for its harshest penalty. Young v Miller, supra, p 1285.

A comparison of foreign jurisdictions also demonstrates that the penalty is disproportionate to the offense. In Smith v the Queen, 34 C.C.C. (3d) 97 (1987) the Supreme Court of Canada in a 5 - 1 majority opinion held unconstitutional a section of Canada's Narcotic Control Act which provided for a minimum sentence of seven years imprisonment. As did this Court, the Canadian Supreme

Court engaged in a proportionality analysis to determine whether the minimum - ntence was cruel and unusual punishment. The Canadian Supreme Court's analysis allowed for comparative examination of foreign law including international human rights documents, English and American legal history, analogies to death penalty cases, and, in particular, this Court's opinion in Solem, 463 US 277 (1983).

In Smith appellant had returned to Canada from Bolivia with 7 1/2 ounces (212.62 grams) of almost 90% pure cocaine with a street value of roughly $150,000. He pled guilty to importing a narcotic contrary to §5 of the Narcotic Control Act and was sentenced to 8 years.

The constitutional issue before the Supreme Court of Canada was whether the mandatory minimum sentence infringed or denied the right and guarantee under §12 of the Canadian Charter of Rights and Freedoms against imposition of cruel and unusual treatment or punishment.

In striking down the statute the court found that the mandatory nature of the penalty completely ignored the individual characteristices of the defendant:

> A seven year sentence for drug importation is not per se cruel and unusual. It may very well be deserved and completely appropriate. It is the fact that the seven year sentence must be imposed regardless of the circumstances of the offender that results in its being grossly disproportionate in some cases and therefore cruel and unusual in those particular cases.
>
> The concept of "the fit sentence"...as basic to modern day theories of punishment is

effectively precluded by the mandatory minimum in S5(2). Judicial discretion to impose a shorter sentence if circumstances warrant is foreclosed and the inevitable result is a legislatively ordained grossly disproportionate sentence in some cases. Smith, supra, at 147-148

As this Court noted in Coker v Georgia, 433 US 584, 591-592 (1977), to pass constitutional muster a sentence must make a measurable contribution to the acceptable goals of punishment. Under the instant statute the mandatory nonparolable life sentence fails to make a measurable contribution to the acceptable goals of punishment and instead frustrates societal goals. Just a few of the consequences that stem from life without parole sentence are over crowded prisons, an aging prison population, and

the development of a class of superinmates.[7]

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7. In United States v Gomez, _____ F Supp _____, No. 88-8025 (E.D. Mich Oct. 5, 1989). The court discussed the societal concerns in sentencing a defendant to life in prison without parole. In Gomez, defendant was a Colombian national and was convicted of being a participant in a scheme to smuggle into the United States 576 kilos of cocaine (576,000 grams) and 16,300 pounds of marijuana. The trial court characterized defendant as "a long time, sophisticated drug trafficker with direct connections to the Medellin Cartel." Defendant was the only participant who went to trial and refused to cooperate with the government. At sentencing the government recommended a sentence of life without parole. One of the reasons offered by the government was that under the Michigan statute defendant would have received life without parole for 650 grams. The District Court rejected the government's recommendation and sentenced defendant to two 30-years concurrent terms. The District Court, however, after reflecting on the sentence felt the sentence was too long and sua sponte, reduced the sentence to concurrent 22-year terms.

In an amended sentencing memorandum and order the court discussed its reasons for rejecting a sentence of life without parole. The court first recognized that "[l]ife without parole is the

B. THE STATUTE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT FAILS TO PROVIDE FOR INDIVIDUALIZED SENTENCING

In a series of cases beginning with Gregg v Georgia, 428 US 153 (1976), and its companion cases,[8] this Court has established a constitutional doctrine of individualized sentencing in capital cases. This doctrine requires that the sentencer must consider any relevant mitigating circumstances of the offense and the offender before imposing the death penalty. Lockett v Ohio, 438 US

(CONT.)penultimate sentence" citing Solem v Helm, supra, and that the "sentence should be imposed only for the severest of crimes, and in the rarest of circumstances." Slip op. at p 4.

8. Woodson v North Carolina, 428 US 280 (1976); Roberts (Stanislaus) v Louisiana, 428 US 325 (1976); Proffitt v Florida, 428 US 242 (1976); Jurek v Texas, 428 US 262 (1976).

586, 597-609 (1978) (plurality opinion) (sentencer must not be precluded from considering any aspect of defendant's character or record and any circumstances of the offense)[9]; Eddings v Oklahoma, 455 US 104 (1982) (Lockett adopted by majority; sentencer may not refuse to consider as a matter of law any relevant mitigating evidence); Skipper v South Carolina, 476 US 1 (1986) (exclusion of testimony regarding defendant's good behavior while in jail awaiting trial violated Lockett and Eddings); Hitchcock v Dugger, 481 US 393, (1987) (unanimous opinion) (jury

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9. The Court in Lockett expressly left open the application of Lockett to mandatory, minimum sentences in concapital cases. 438 US at 605 fn 13.

was improperly instructed and judge improperly refused to consider mitigating circumstances not listed in statute); Penry v Lynaugh, ___ US ___, 109 SCt 2934, 2947-2952 (1989) (defendant entitled to jury instruction so that jury could give effect to his mitigating evidence).

Mandatory death penalty statutes of all types, no matter how narrowly drawn, have been struck down by this Court as violative of the Eighth Amendment. Woodson v North Carolina, 428 US 280 (1976); Roberts (Stanislaus) v Louisana, 428 US 325 (1976); Roberts (Harry) v Louisana, 431 US 633 (1977); Sumner v Shuman, 483 US 66 (1987). See discussion of these cases, infra.

Although this Court's prior cases involved capital punishment and the

instant case involves life imprisonment without parole,[10] the rationale of these cases is applicable in both contexts. Like the death penalty, mandatory life imprisonment without parole "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty..." Woodson, supra, 428 US at 304. Indeed, a number of the factors used by this Court in Lockett to distinguish capital and non-capital cases -- e.g., the availability of probation, parole, work

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10. The one significant exception is Solem v Helm, 463 US 277 (1983), which found that a sentence of life imprisonment without parole for a seventh nonviolent felony constituted cruel and unusual punishment. Unlike the instant case the trial court in Solem was not required to impose life without parole. 463 US at 281 n. 6

furloughs -- are also unavailable under Michigan's life without parole statute. Lockett, supra, 438 US at 605. Thus, this Court's capital sentencing decisions should be applied in determining the constitutionality of the instant Statute.[11] In Woodson v North Carolina,

11. See, United States v Perez, 685 F Supp 990, 1002 (W.D. Tex. 1988), cert denied, 110 SCt 1153 (1989), a pre-Mistretta Sentencing Guidelines case wherein Judge Nowlin stated in dicta as follows:

> The Court also finds guidance in Supreme Court decisions which mandate that a sentencing judge or jury cannot be restricted from considering all relevant mitigating circumstances when the death penalty is a possibility. [citing Lockett, Eddings, Skipper, and Hitchcock]. Some distinctions may be appropriate between procedures for capital and noncapital cases because the sentences differ in kind. The Court is of the opinion, however, that the defendant's ability to inform the Court of circumstances and factors unique to him and the Court's ability to consider such factors should not be determined by whether the defendant faces a maximum punishment of death, a life sentence, or a lesser term of incarceration.

this Court struck down a North Carolina statute which provided for a mandatory death penalty for all persons convicted of first degree murder. The Court quoted with approval Justice Black's statement of twenty-seven years earlier that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Woodson, supra, 428 US at 296-297 (quoting Williams v New York, 337 US 241, 247 (1949)).

In Roberts (Stanislaus) v Louisiana, supra, decided the same day as Woodson, a provision of the Louisiana mandatory death penalty statute defined first-degree murder more narrowly than the North Carolina statute and provided for

automatic jury instructions on lesser included offenses. The Court did not find these differences to be of constitutional significance and again struck down the mandatory death penalty statute, finding the "constitutional vice" of such statutes to be the "lack of focus on the circumstances of the particular offense and the character and propensities of the offender." 428 US at 333.

In Roberts (Harry) v Louisiana, 431 US 633 (1977), the Court addressed a mandatory death penalty provision which was even more narrowly drawn. A different Louisiana provision from that in Stanislaus (Roberts) provided for mandatory death if the murder victim was a police officer performing his lawful duties. Nevertheless, the Court struck

down the provision as an unconstitutional mandatory statute. 431 US at 636-637.

Finally, in 1987 the Court addressed the question which had been expressly left open in previous cases:[12] whether the Eighth Amendment prohibits a statute which provides for a mandatory death penalty as to a prison inmate who murders while serving a sentence of life imprisonment without parole. Sumner v Shuman, 483 US 66 (1987). The Sumner Court, after providing a comprehensive summary of this Court's cases comprising the "individualized capital-sentencing docrtine," 483 US at 73-76, found that

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12. Woodson, 428 US at 287 n 7; Stanislaus Roberts, 428 US at 334 n. 9; Harry Roberts, 431 US at 637 n. 5

even under these extreme circumstances, the Eighth Amendment did not permit a departure from the requirement of individualized sentencing.

Thus this Court has struck down as cruel and unusual punishment every statute which has provided for a mandatory death penalty.[13]

The reasoning behind the Court's

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13. Blystone v Pennsylvania, ___ US ___, 110 SCt 1078 (1990), and Boyde v California, ___ US ___, 110 SCt 1190 (1990) are not to the contrary. In Blystone the Court upheld a statute which provided that if a jury finds at least one aggravating circumstance and finds no mitigating circumstances, then it must impose the death penalty. Similarly, in Boyde the Court upheld a statute which provided that if a jury finds that the aggravating circumstances outweigh the mitigating circumstances, then it must impose the death penalty. Unlike the statutes in Woodson and its progeny, and the Michigan statute in the instant case, the Pennsylvania and California statutes allowed the sentencer to consider any mitigating circumstances and therefore were not impermissibly mandatory.

capital cases applies as well to the Michigan statute providing for mandatory life imprisonment without parole for possession of 650 grams of a mixture containing cocaine. The unique nature of the penalty of life imprisonment without possibility of parole is underscored by this Court's decision in Solem v Helm, 463 US 277 (1983), and a comparison with its predecessor, Rummel v Estelle, 445 US 263 (1980).

In Rummel this Court held that a sentence of life imprisonment (with possibility of parole) under a recidivist statute for a third non-violent felony did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. Three terms later the Court was faced with a similar question: whether a sentence of life

imprisonment (without possibility of parole) for a seventh non-violent felony constituted cruel and unusual punishment. Helm, supra.

The district court in Helm found Rummel dispositive and rejected the defendant's claim, but the Eighth Circuit Court of Appeals reversed. As characterized by this Court, the Eighth Circuit found that "Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabililtation as a goal of the criminal justice system." Helm, supra, 463 U.S. at 283-284 (citing Helm v Solem, 684 F.2d 582 ((8th Cir. 1982).

Over a strong dissent which accused the Court of ignoring controlling

precedent and improperly apply Eighth Amendment concepts from capital cases,[14] this Court affirmed. The Court repeatedly emphasized the lack of possibility of parole in the South Dakota statute and relied exclusively on this factor in distinguishing Rummel. 463 U.S. at 303 n. 32. As stated by the Court:

> Helm's present sentence is life imprisonment without possibility of parole. Barring executive clemency, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v Estelle, Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily. Helm's sentence is the most severe punishment that the State could have

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14. Helm, 463 U.S. at 304 (Burger, C.J., dissenting).

imposed on any criminal for any crime. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

463 U.S. at 297 (citations and footnotes omitted. In light of Helm, the constitutional significance of a life sentence which precludes parole cannot be doubted.

The Michigan statute mandating life without parole for a narcotics offense suffers from the same infirmities as the mandatory statutes in Woodson, the Roberts cases, and Sumner, supra. These statutes could not withstand Eighth Amendment scrutiny because they did not permit individualized consideration of the offender and the offense. See,

Lockett, Eddings, and their progeny, supra.[15]

Similarly, the Michigan statute permits no such individualized consideration. A defendant convicted of possessing 650 grams of a mixture containing cocaine is automatically given the most severe punishment under Michigan law and will ultimately die in

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15. The Judicial Conference of the United States recently submitted a resolution to the United States Congress urging Congress to reconsider the wisdom of statutory mandatory minimum sentences. Report of the Proceedings of the Judicial Conference of the United States, p 16 (Washington, D.C., March 13, 1990). In doing so, the Conference followed resolutions submitted by judges of the Third, Eighth, Ninth, and Tenth Circuits (reprinted in 135 Cong. Rec. S12703-12704 (daily ed. Oct. 5, 1989). In addition, the Federal Courts Study Committee, consisting of fifteen members appointed by the Chief Justice, recently issued its final report recommending repeal of statutory mandatory minimum sentencing provisions. 47 Crim L Rep (BNA) 1057-1059 (April 18, 1990)

prison.[16] The Michigan statute runs contrary to this Court's Eighth

16. Amici do not contend that any statute imposing mandatory life without parole, such as Michigan's first-degree murder statute, Mich. Comp. Laws §750.316 (1979), would be unconstitutional. In contrast to the instant offense, which does not distinguish between degrees of individual culpability, Michigan statutes do distinguish between types of murder, i.e., first and second degree. First-degree murder requires as an element some circumstance (which can be termed "aggravating"), such as premeditation, poison, lying in wait, or felony murder. Only if such an "aggravating circumstance" is proven is the murder defendant sentenced to mandatory life without parole; otherwise the defendant may be sentenced to life (with parole) or any term of years. Mich Comp Laws §750.317 (1979). Thus the complete lack of individualized consideration given to "650" drug defendants is not present with respect to murder defendants. Similarly, the federal drug statutes providing for mandatory life without parole apply only to repeat offenders or drug kingpins who have committed a continuing series of violations under 21 USC §848.

Amendment jurisprudence, in violation of "the principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v Lynaugh, supra, US , 109 SCt 2934, 2947 (1989). Accordingly, this Court should hold that the penalty of mandatory life imprisonment without parole under Mich Comp Laws §333.7401(3) (1979) constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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APPENDIX -la-

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE NO DISCRETION
ALABAMA Code of	13-A211 dist 13-A-212 poss 13A-231 trafficking	2-20 yrs 1-10 yrs 500 - 1,00 g mandatory min - 5 yrs	No
ALASKA	11.71.030	1st time/2-10 yrs 2nd time/4-10 yrs 34d time/6-10 yrs	No
ARIZONA Revised Stats Ann	13-3408 (A)(1) poss (A)(2) poss for sale (A)(7) transport for sale	4 yrs 7 yrs	No
ARKANSAS	82-2601 et seq >400 grams	40 years	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
CALIFORNIA West's Ann	11351 poss for sale 11352 transport, sale give away more than 3 lbs more than 25 lbs more than 100 lbs	2, 3, 4 yrs 3, 6, 9 yrs add 5 yrs add 10 yrs add 15 yrs	No
COLORADO Rev Stats	18.18.105 et seq 28 g or more	4 - 16 yrs mandatory min 4	No
CONNECTICUT Gen Stats Ann	21a278(a) 54-125 one oz of cocaine 1/2 oz free base	minimum 5-20 yrs maximum life	No
DELAWARE Code Ann	16§4751(a) 11§4205	addict -up to 25yrs non-addict -30 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
DISTRICT OF COLUMBIA	33.501 et seq.	4-15 yrs mandatory min of 4 yrs suspended if first offender addict	No
FLORIDA West's Stats Ann	893.01 et seq. manufacture, poss, sale trafficking more than 400 g	0-15 yrs 15 year mandatory minimum	No
GEORGIA Code Ann	16-13-20 et seq. poss poss w/ intent manufacture, bring into state, sell, etc more than 400 g	1st offense 2nd 2-15 yrs 5-30 5-30 yrs life 25 yrs mand minimum	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
HAWAII Rev Stats	329-1 et seq.	0-5 yrs	No
IDAHO Code	32-2732(a)(1)A	up to life/parolable after 10 yrs	No
ILLINOIS S.H.A.	56 1/2 et seq. 400-900 g	not less than 12 yrs nor more than 50 yrs	No
INDIANA Stats Ann	35-48-1-1 more than 3 g	30 yrs	No
IOWA	204.401(1)(a)(b)(2)(a) 500 g - 1,000 g or 5-50 g of crack 21-4501 (penalty)	3-5 yr minimum 10-20 yr max not more than 25 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
KANSAS Stat Ann	65-4101 et seq.	life eligible for parole after 15 yrs (no good time	No
KENTUCKY Rev Stats	218A.010 et seq.	1st offense 5-10 yrs 2nd 10-20 yrs	No
LOUISIANA Rev Stats	40.967(A),(B),(F) more than 400 g	15-30 yrs hard labor parole is precluded for offenses involving crack	No
MAINE Rev Stats Ann	17A§1100 et seq. 17A§1252 more than >13 g	0-10 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
MARYLAND Code	27.286(F)(1) & (3) more than 447 g	0-20 yrs mandatory min of 10 yrs	No
MASSACHUSETTS M.G.L.A.	94C§32A	mandatory min of 1 yr 2 1/2 - 10 yrs	No
MICHIGAN MCLA	333.7401 et seq. manufacture, delivery, poss with intent and poss of more than 650 g	mandatory non-parolable life, no good time, no parole	Yes
MINNESOTA Stats Ann	152.021(1) & (2)	0-30 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
MISSISSIPPI Code	41-29-139(b)(1)	0-30 yrs	No
MISSOURI V.A.M.S.	195.010 et seq. poss distribution trafficking 1st/2nd degree	0-7 yrs 5-15 yrs 10-30 yrs or life, no parole	No
MONTANA Codes Ann	50-32-101 et seq.	2 yrs to life	No
NEBRASKA Rev Stats	28-146(4) & (5) 7 ozs or more	5 yr mandatory min/50 yr max	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
NEVADA Rev Stats	453.011 et seq. 400 grams or more	15 yrs - life parolable after min	No
NEW HAMPSHIRE Rev Stats	318.B:26(1)(a) 5 ozs or more	0-30 yrs possibility of life if habitual drug offender	No
NEW JERSEY Stats Ann	2c:35-5 5 ozs or more 2c:43-6 - 1st degree crime	10-30 yrs/pros can waive mand min	No
NEW MEXICO	30-31-1 et seq.	1st offense 9 yrs 2nd 18 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDFR NON-PAROLABLE LIFE -- NO DISCRETION
NEW YORK Penal Law	220.00 et seq. poss w/intent to deliver sale 1/2 oz sale 2 oz	minimum/maximum 1 yr 7 yrs 3-8 life 15-25 life parolable after min	No
NORTH CAROLINA Gen Stats	90-86 et seq. 28 g - 200 g 200 g - 400 g 400 g or more	7 yrs mand min 14 yrs mand min 35 yrs mand min	No
NORTH DAKOTA C.C.	19-03.1 et seq. 500 g or more	up to life parolable after 30 yrs minus good time	No
OHIO	2925.	1-10 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
OKLAHOMA Stats Ann	63 §2401 et seq. poss w/intent up to deliver possession	5-life suspended for first offender 2-10 yrs; double second offense	No
OREGON Rev Stats	475.992(1)(b) 161.605	10 yrs	No
PENNSYLVANIA Stats	780.101 et seq.	0-15 yrs	No
RHODE ISLAND Gen Laws	21-28-1.01 et seq. 28 g - 1,000 g drug addict more than 1,000 grams	10 yr mand min 30 yrs 20 yrs to life departure allowed	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
SOUTH CAROLINA Code	44-53-110 et seq. 400 g or more	mandatory min of 25-30 yrs	No
SOUTH DAKOTA C.L.	22-42-2	10 yrs - at least 1 yr mandatory min	No
TENNESSEE C.A.	39-6-401 et seq. 30 g or more	10 yrs to life parolable after 19 yrs on life sentence	No
TEXAS Health Code	481.112 400 g or more	15-99 yrs or life parolable after 20 on life sentence	No
UTAH C.A.	5837-8(1)(a)(i)	1-15 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
VERMONT Stats Ann	16 §423 sale of 28 g or more	0-20 yrs	No
VIRGINIA Code	54 §18-2-248	5-40 yrs	No
WASHINGTON West's RCWA	69.50.40(a)(1) 2,000 g or less	0-10 yrs	No
WEST VIRGINIA Code	60A-4-401	1-5 yrs	No
WISCONSIN Stats Ann	161.41(C)(3) more than 30 g	1-15 yrs	No
WYOMING Stats	35-7-1031	0-20 yrs	No